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In The Supreme Court of the United States

HANY E. WILLIAM,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a motion to reopen timely filed if it is filed within ninety days of the Board of Immigration Appeals' denial of a motion to reconsider?

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PETITION FOR WRIT OF CERTIORARI

Hany E. William, Petitioner, respectfully prays that the Supreme Court issue a writ of certiorari to review the Fifth Circuit's judgment in this case.

OPINIONS BELOW

The Fifth Circuit's opinion, *William v. INS*, 217 F.3d 340 (5th Cir. 2000), is on pages 1-7 of the Appendix. The Board's denial of William's Motion to Reopen, *In re William*, A73-122-128 (BIA May 21, 1999), is on pages 8-9 of the Appendix. The Board's denial of William's Motion to Reconsider, *In re William*, A73-122-128 (BIA April 30, 1998), is on pages 10-13 of the Appendix. The Board's dismissal of William's appeal, *In re William*, A73-122-128 (BIA September 24, 1997), is on pages 14-22 of the Appendix.

JURISDICTION

The Fifth Circuit entered its judgment in this case on July 17, 2000. *William v. INS*, 217 F.3d 340 (5th Cir. 2000). In compliance with Supreme Court Rule 13.1, this petition has been filed within ninety days of the entry of judgment. Under 28 U.S.C. § 1254(1), the Supreme Court has jurisdiction to review the Fifth Circuit's judgment.

REGULATION INVOLVED IN THIS CASE

8 C.F.R. § 3.2(c)(2) (1997) states:

> Except as provided in paragraph (c)(3) of this section, a party may file only one

> motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

STATEMENT OF THE CASE

Hany E. William ("William") was born in Egypt and lawfully entered the United States on a student visa. William is married to a United States citizen. Based on a charge that William did not comply with the conditions of his nonimmigrant status, an Immigration Judge ordered William deported to Egypt on July 27, 1995. The Immigration Judge denied William's application for asylum and withholding of deportation. On September 24, 1997, the Board of Immigration Appeals (the "Board") dismissed William's appeal of the Immigration Judge's decision.

William filed a Motion to Reconsider with the Board on October 22, 1997. On April 30, 1998, the Board denied William's Motion to Reconsider. William filed a Motion to Reopen with the Board on July 28, 1998. On May 21, 1999, the Board denied William's Motion to Reopen solely because the Board believed that William's Motion to Reopen was untimely. On June 21, 1999, William filed a Petition for Review with the Fifth Circuit. On July 17, 2000, the Fifth Circuit affirmed the Board's May 21, 1999 order.

The Fifth Circuit had jurisdiction to review the Board's May 21, 1999 denial of William's Motion to Reopen because § 309(c)(4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (hereinafter "IIRAIRA") states:

> (C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;
>
> (D) the petition for review shall be filed with the court of appeals for the judicial district in which the administrative proceedings before the special inquiry officer or immigration judge were completed.

Because the Board's denial of a motion to reopen is a final order of deportation, the Fifth Circuit had jurisdiction to review the Board's denial of William's Motion to Reopen. *See Stone v. INS*, 115 S. Ct. 1537, 1544 (1995) ("Upon denial of reconsideration, the petitioner would file a separate petition to review that second final order"); *Kalaw v. INS*, 133 F.3d 1147, 1150 n.4 (9th Cir. 1997) ("The phrase 'final order of deportation' also includes a BIA denial of a motion to reopen deportation proceedings"); *Ka Fung Chan v. INS*, 634 F.2d 248, 252 (5th Cir. Jan. 1981) ("A denial of a motion to reopen deportation proceedings is a final order of deportation reviewable in the Court of Appeals under 8 U.S.C. § 1105a").

REASONS FOR GRANTING THIS PETITION

I. 8 C.F.R. § 3.2(c)(2) STATES THAT A MOTION TO REOPEN MUST BE FILED WITHIN NINETY DAYS OF THE **FINAL** ADMINISTRATIVE DECISION IN THE PROCEEDING SOUGHT TO BE REOPENED

The Board of Immigration Appeals (the "Board") denied William's Motion to Reconsider on April 30, 1998. *William v. INS*, 217 F.3d 340, 341 (5th Cir. 2000). Even though William's Motion to Reopen was filed with the Board less than ninety days later, the Board dismissed William's Motion to Reopen as untimely. *Id.*

A motion to reopen "must be filed no later than 90 days after the date on which the **final** administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. § 3.2(c)(2) (emphasis added). The plain meaning of "final" is "last." The American Heritage Dictionary of the English Language 492 (New College ed. 1976). At the time William filed his Motion to Reopen, the Board's denial of his Motion to Reconsider was the last administrative decision in his case. Because William's Motion to Reopen was filed within ninety days of the last administrative decision, William's Motion to Reopen was timely filed under the plain meaning of 8 C.F.R. § 3.2(c)(2).

A court does not defer to an agency's interpretation of a regulation if "an alternative reading is compelled by the regulation's plain language . . . ." *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386 (1994) (internal quotation marks omitted). Because the plain language of 8 C.F.R. § 3.2(c)(2) shows that William's Motion to Reopen was timely filed, no deference should be given to the Board's legal conclusion that William's Motion to Reopen was untimely.

In reviewing the Board's denial of William's Motion to Reopen, the Fifth Circuit stated:

> William's petition for review presents an issue of first impression: whether the decision in William's original appeal to the BIA, as distinguished from the subsequent denial of his motion to reconsider, was the "final administrative decision . . . in the proceeding to be reopened." If the dismissal of his original appeal qualifies, then his motion to reopen was untimely. **But if the denial of his motion to reconsider is the final decision under § 3.2(c)(2), the motion to reopen was timely**.

William v. INS, 217 F.3d 340, 342 (5th Cir. 2000) (emphasis added).

The Fifth Circuit agreed with the argument by

the Immigration and Naturalization Service (INS) that

> [B]ecause William's motion to reopen should relate to "the proceeding to be reopened," it is the underlying deportation decision, and not the denial of the motion to reconsider, that is being challenged. This is so because William seeks to introduce new evidence that he contends will affect his deportation — i.e., that his wife is going to become a citizen.
>
> This evidence could not be introduced in a proceeding for a motion to reconsider, the INS notes, because that type of motion challenges only the legal analysis employed by the immigration judge. The deportation proceeding is the proper forum for this new evidence, because there the immigration judge can take into account any additional factors supporting discretionary relief from deportation. That is to say, because an alien who seeks to introduce new evidence can reopen only a proceeding that once was open for the receipt of evidence, the motion to reopen must look back to an evidentiary proceeding rather than to the denial of reconsideration.

William, 217 F.3d at 342.

None of this reasoning is relevant to

determining the deadline for filing a motion to reopen and **none** of this reasoning is based on the plain language of 8 C.F.R. § 3.2(c)(2). The Fifth Circuit's reasoning relates to the purpose of a motion to reopen, **not** to the deadline for filing a motion to reopen. The deadline for filing a motion to reopen is determined by the **plain language** of 8 C.F.R. § 3.2(c)(2). *See KCMC, Inc. v. FCC*, 600 F.2d 546, 552 (5th Cir. 1979) ("We approach the issue at hand by noting that, in construing a regulation, we must employ the rules of construction generally applicable to statutes. Thus, where the language selected by the drafters is clear and unequivocal, the courts are bound to give effect to the **plain meaning** of the chosen words and no duty of interpretation arises") (citation omitted) (emphasis added); *In re H-N-*, Int. Dec. 3414 (BIA 1999) ("If the statutory language is clear, that is the end of the inquiry, as Immigration Judges and this Board, as well as the courts, must give effect to the unambiguously expressed intent of Congress. **The same is true of regulations**. It is assumed that the legislative purpose is expressed by the ordinary or **plain meaning** of the words used") (emphasis added).

The Fifth Circuit stresses that a "motion to reopen must look back to an evidentiary proceeding." *William*, 217 F.3d at 342. Yet, the Board's September 24, 1997 dismissal of William's appeal — which the Fifth Circuit believes started a single ninety-day clock for William's Motion to Reopen — was an appellate proceeding, not an evidentiary proceeding. In fact, in

dismissing William's appeal, the Board refused to consider new evidence submitted by William during the appeal:

> We emphasize in this regard that while evidence has been proffered on appeal, there has been no showing that such evidence could not have been presented before the Immigration Judge. We therefore find no basis for a remand of the record. *See Matter of Coelho*, 20 I. & N. Dec. 464 (BIA 1992); *see also Matter of Fedorenko*, 19 I. & N. Dec. 57, 74 (BIA 1984) ("**The Board is an appellate body whose function is to review, not to create, a record**").

In re William, A73-122-128 (BIA September 24, 1997) (emphasis added) (Appendix at 19). As indicated in the above quotation, the Board does not conduct evidentiary proceedings. For example, if William's Motion to Reopen had been granted, the Immigration Judge, rather than the Board, would have heard testimony from William and his wife in connection with his application for adjustment of status.

If the Fifth Circuit's reasoning is accepted, then the proceeding that William's Motion to Reopen seeks to reopen is the July 27, 1995 proceeding at which the Immigration Judge ordered William deported because that was William's last evidentiary proceeding. Yet,

even the Fifth Circuit does not believe that William's Motion to Reopen needed to have been filed within ninety days of July 27, 1995. *William*, 217 F.3d at 341-42. 8 C.F.R. § 3.2(c)(2) does **not** state that a motion to reopen must be filed within ninety days of **the first or second** administrative decision in the proceeding sought to be reopened. Rather, 8 C.F.R. § 3.2(c)(2) states that a motion to reopen must be filed within ninety days of the **final** administrative decision in the proceeding sought to be reopened. Neither the July 27, 1995 evidentiary proceeding at which William was ordered deported, nor the Board's September 24, 1997 dismissal of William's appeal, was the **final** administrative decision in the proceeding sought to be reopened. At the time William's Motion to Reopen was filed, the Board's April 30, 1998 denial of William's Motion to Reconsider was the final administrative decision in the proceeding sought to be reopened.

In construing 8 C.F.R. § 3.2(c)(2), the Fifth Circuit held:

> Although William's construction is not unreasonable, neither is the INS's, because "final administrative decision" refers to "the proceeding sought to be reopened." It is possible that, as William suggests, this phrase refers to the broader deportation process, but we cannot say that the INS's determination that the phrase refers to the particular stage of the process sought to be

> reopened is plainly erroneous or inconsistent with the regulation.

William, 217 F.3d at 343 (internal quotation marks omitted).

The Fifth Circuit's reasoning leads to the conclusion that "the proceeding sought to be reopened" was William's July 27, 1995 proceeding because that was William's final evidentiary proceeding, that was the proceeding at which William was ordered deported, and the Immigration Judge's order of deportation in that proceeding is what William ultimately seeks to avoid if his Motion to Reopen is granted.

Because the Fifth Circuit views the Board's September 24, 1997 dismissal of William's appeal as the start of a single ninety-day window for William's Motion to Reopen, the Fifth Circuit must consider the Board's September 24, 1997 decision to be a decision "in" the proceeding sought to be reopened, given that 8 C.F.R. § 3.2(c)(2) states that a motion to reopen must be filed within ninety days of the final administrative decision "in" the proceeding sought to be reopened. However, if the Board's September 24, 1997 dismissal of William's appeal is considered a decision "in" the proceeding sought to be reopened — the July 27, 1995 evidentiary proceeding at which William was ordered deported — then the Board's April 30, 1998 denial of William's Motion to Reconsider also must be considered a decision in the proceeding sought to be

reopened. There is no rational explanation for why only one of these two decisions by the Board should be considered a decision "in" the proceeding sought to be reopened. Both of these decisions by the Board were part of William's deportation proceeding. In fact, the heading of each decision states: "IN DEPORTATION PROCEEDINGS." (Appendix at 10, 14.)

Moreover, the Board previously has used the terms "first proceeding" and "second proceeding" to refer to situations in which the "first deportation proceeding" was terminated and a "second deportation proceeding" was later initiated, rather than to describe stages within a single deportation proceeding. *See Matter of Balderas*, 20 I. & N. Dec. 389, 393 (BIA 1991) ("[W]e hold that a conviction which has once been relied upon in a charge of deportability may be alleged as one of the 'two crimes involving moral turpitude' in a second proceeding, even though the first proceeding was terminated by a grant of relief under section 212(c) of the Act, where the second crime alleged is a subsequent conviction or a conviction that was not disclosed in the prior proceeding"). In other words, the term "proceeding" refers to all of the stages within the deportation process. *See In re W-F-*, 21 I. & N. Dec. 503, 506 n.3 (BIA 1996) ("[D]eterminations of deportability and those regarding relief from deportation **are part of one single deportation proceeding**") (emphasis added). Thus, the Board's denial of William's Motion to Reconsider was part of William's "one single deportation proceeding," which

means that, at the time William's Motion to Reopen was filed, the Board's denial of William's Motion to Reconsider was the final administrative decision in the "one single deportation proceeding" sought to be reopened. It should be noted that the term "proceeding" also has a broad meaning in other contexts. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 62-63 (1980) ("Indeed, throughout Title VII the word 'proceeding,' or its plural form, is used to refer to all the different types of proceedings in which the statute is enforced, state and federal, administrative and judicial").

The Fifth Circuit states that "the denial of a motion to reconsider cannot be 'reopened' where it was never open to the type of new evidence William seeks to introduce." *William*, 217 F.3d at 342. The Fifth Circuit misstates what is reopened when a motion to reopen is granted. When a motion to reopen is granted, "proceedings," rather than a "decision," are reopened. *See* 8 C.F.R. § 3.2(c) ("A motion to reopen **proceedings** shall state . . . . A motion to reopen **proceedings** for the purpose . . . . A motion to reopen **proceedings** shall . . . .") (emphasis added). A motion to reopen seeks to reopen "proceedings," not a decision. If this were not the case, § 3.2(c) would refer to a motion to reopen as a "motion to reopen a decision," rather than as a "motion to reopen proceedings." If William's Motion to Reopen had been granted, his deportation proceedings would have been reopened.

In focusing on the phrase "proceeding sought to be reopened," the Fifth Circuit ignores the fact that 8 C.F.R. § 3.2(c)(2) states that a motion to reopen must be filed within ninety days of the **final** administrative decision in the proceeding sought to be reopened. 8 C.F.R. § 3.2(c)(2) does **not** state that a motion to reopen must be filed within ninety days of **the first or second** administrative decision in the proceeding sought to be reopened. By ignoring the plain meaning of 8 C.F.R. § 3.2(c)(2), the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by [the Board], as to call for an exercise of this Court's supervisory power," Sup. Ct. R. 10(a).

II. CONGRESS HAS ABANDONED THE PHRASE "RENDERED IN THE PROCEEDING SOUGHT TO BE REOPENED"

The Fifth Circuit's holding is based entirely on the regulation's use of the phrase "rendered in the proceeding sought to be reopened." *See William*, 217 F.3d at 342 ("[I]f the denial of his motion to reconsider is the final decision under § 3.2(c)(2), the motion to reopen was timely. . . . [W]hile the regulation's use of 'final administrative decision' is facially **unambiguous**, it invites, in the context of the next phrase, 'rendered in the proceeding sought to be reopened,' at least two reasonable interpretations") (emphasis added). A fair reading of the Fifth Circuit's opinion reveals that the Fifth Circuit would have held that William's Motion to Reopen was timely filed if the phrase "rendered in the proceeding sought to be reopened" had been deleted from 8 C.F.R. § 3.2(c)(2). In a sense, this phrase has now been deleted by Congress. Section 240(c)(6)(C)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1230(c)(6)(C)(i), which was enacted after 8 C.F.R. § 3.2(c)(2) was promulgated, states: "[T]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." There is no language in this provision similar to the phrase "rendered in the proceeding sought to be reopened."

The Fifth Circuit acknowledges that *Stone v. INS*, 115 S. Ct. 1537 (1995), held that the Board's denial of a motion to reconsider is a final order of deportation. *William*, 217 F.3d at 342. Thus, if the Fifth Circuit had applied INA § 240(c)(6)(C)(i) to William's case, the Fifth Circuit would have ruled that William's Motion to Reopen was timely because his Motion to Reopen was filed within ninety days of a final order of deportation. A statutory provision trumps a previously promulgated regulation, so, if the Fifth Circuit had applied INA § 240(c)(6)(C)(i) to William's case, the Fifth Circuit would not have considered the regulation's use of the phrase "rendered in the proceeding sought to be reopened."

Because William's deportation proceedings began before April 1, 1997, and because the Board's denial of William's Motion to Reopen occurred after October 30, 1996, the transitional rules of IIRAIRA apply to William's case and INA § 240(c)(6)(C)(i) does not apply to William's case. IIRAIRA § 309(c)(1), (c)(4). However, INA § 240(c)(6)(C)(i) should still be considered in this case because of the confusion the Fifth Circuit's decision is causing. The deadline for filing a motion to reopen is now set by INA § 240(c)(6)(C)(i), rather than by 8 C.F.R. § 3.2(c)(2). The plain meaning of INA § 240(c)(6)(C)(i) is that the deadline for filing a motion to reopen is ninety days after a final order of deportation. Yet, a reader of the Fifth Circuit's opinion might not be sure of the deadline for filing a motion to reopen, given the Fifth Circuit's failure to apply the plain meaning of 8 C.F.R. §

3.2(c)(2) in this case. In fact, it is likely that the INS and the Board will erroneously assert that the Fifth Circuit's opinion in this case stands for the proposition that, even under INA § 240(c)(6)(C)(i), a motion to reopen filed within ninety days of the Board's denial of a motion to reconsider is untimely.

The Supreme Court can end this confusion by granting this petition for a writ of certiorari and explaining that there actually is no conflict between INA § 240(c)(6)(C)(i) and 8 C.F.R. § 3.2(c)(2) because both provisions state that the deadline for filing a motion to reopen is ninety days after the **final** administrative decision. In fact, Congress' abandonment of the phrase "rendered in the proceeding sought to be reopened" shows that this phrase was not intended to play a significant role in establishing the deadline for the filing of a motion to reopen.

Supreme Court Rule 10(c) states that in deciding whether to grant a petition for a writ of certiorari, the Court considers whether "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." The Supreme Court has not determined the deadline for filing a motion to reopen. This is an important question of federal law that should be settled by the Court because the deadline for filing a motion to reopen is an issue every time a motion to reopen is filed. The confusion caused by the Fifth Circuit's opinion makes matters even worse. Because the Fifth

Circuit is the only court that has made a ruling concerning the deadline for filing a motion to reopen, people around the country are unable to refer to any other authority on this issue. If the Court does not grant this petition, the Fifth Circuit's erroneous pronouncements regarding the deadline for filing a motion to reopen will be the only "guidance" on this issue.

III. IT IS A RULE OF CONSTRUCTION THAT IDENTICAL WORDS USED IN DIFFERENT PARTS OF A STATUTE OR REGULATION HAVE THE SAME MEANING, SO THE FACT THAT THE DENIAL OF A MOTION TO RECONSIDER IS A FINAL ADMINISTRATIVE DECISION IN CONNECTION WITH ONE PROVISION MEANS THAT THE DENIAL OF A MOTION TO RECONSIDER IS A FINAL ADMINISTRATIVE DECISION IN CONNECTION WITH OTHER PROVISIONS

As the Fifth Circuit acknowledges, *William*, 217 F.3d at 342, the Supreme Court has held that the Board's denial of a motion to reconsider is a final order of deportation. *See Stone v. INS*, 115 S. Ct. 1537, 1544 (1995) ("Upon **denial of reconsideration**, the petitioner would file a separate petition to review that **second final order**. . . . Because only '**final deportation order[s]**' may be reviewed, 8 U.S.C. § 1105a(a)(1), it follows by necessity that the provision requires for its operation the existence of **two separate final orders**, the petitions for review of which could be consolidated") (emphasis added) (alteration in original).

Courts have repeatedly held that the Board's denial of a motion to reopen is a final administrative decision. *Arrozal v. INS*, 159 F.3d 429, 434 n.3 (9th

Cir. 1998) ("Denials of motions to reopen deportation proceedings are final administrative decisions"); *Kalaw v. INS*, 133 F.3d 1147, 1150 n.4 (9th Cir. 1997) ("The phrase 'final order of deportation' also includes a BIA denial of a motion to reopen deportation proceedings"); *Sanchez-Marquez v. INS*, 725 F.2d 61, 62 (7th Cir.) (per curiam) ("The BIA's denial of a motion to reopen deportation proceedings is a final order of deportation . . . ."), *cert. denied*, 105 S. Ct. 128 (1984). Although these cases and *Stone* involve provisions other than 8 C.F.R. § 3.2(c)(2), "[i]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 113 S. Ct. 2006, 2011 (1993) (citation and internal quotation marks omitted); *see also United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 108 S. Ct. 626, 630 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear . . . ."). Thus, the Board's denial of a motion to reconsider also must be considered a final administrative decision for purposes of 8 C.F.R. § 3.2(c)(2).

In other words, the phrase "final administrative decision" cannot have a meaning in one provision and have an entirely different meaning in another provision. That would conflict with the rule of construction — and

with what common sense says — that identical words used in different parts of a statute or regulation have the same meaning. Under this rule of construction, the phrase "final administrative decision" in 8 C.F.R. § 3.2(c)(2) encompasses, as it does in other provisions, the Board's denial of a motion to reconsider. Therefore, because William's Motion to Reopen was filed within ninety days of the Board's denial of William's Motion to Reconsider, William's Motion to Reopen was filed within ninety days of the final administrative decision.

IV. THE INS ERRONEOUSLY ASSERTS THAT POLICIES CONCERNING MOTIONS TO REOPEN ARE RELEVANT TO THE ISSUE OF WHETHER WILLIAM'S MOTION TO REOPEN WAS TIMELY FILED

In its brief to the Fifth Circuit, the INS argued: "In this case, the policy of disfavoring motions to reopen deportation proceedings should lead this Court to accord additional deference to the Board's decision." The INS is confusing the issue of whether a motion to reopen should be granted with the issue of whether a motion to reopen is timely. It might be appropriate for the Board to consider policies regarding motions to reopen in making the ultimate determination of whether to grant or deny a motion to reopen as a matter of discretion. However, policies concerning motions to reopen have nothing to do with the issue of whether William's Motion to Reopen was timely filed — that is a

question of law that involves the plain meaning of 8 C.F.R. § 3.2(c)(2).

In its brief to the Fifth Circuit, the INS also argued: "Congress has repeatedly expressed its opposition to allowing motions to reopen to delay deportation." The INS is confusing the issue of whether an alien should be granted a stay of deportation as a result of a pending motion to reopen with the issue of whether William's Motion to Reopen was timely. The filing of William's Motion to Reopen did not entitle him to a stay of deportation. 8 C.F.R. § 3.2(f). Thus, the filing of William's Motion to Reopen did not allow him to "delay deportation."

V. CONCLUSION

For the foregoing reasons, Hany E. William respectfully requests that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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No. 99-60422,
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Fifth Circuit.
July 17, 2000.

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Petition for Review of an Order of the Board of Immigration Appeals.

Before DAVIS, SMITH and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Hany William petitions for review of an order of the Board of Immigration Appeals ("BIA") dismissing,

as untimely, his motion to reopen deportation proceedings. Concluding that the interpretation by the Immigration and Naturalization Service ("INS") of its regulation is not unreasonable, we deny the petition for review and affirm the order of the BIA.

I.

William, an Egyptian citizen, entered the United States on a student visa in 1992. In 1994, he was issued an order to show cause why he should not be deported for failing to maintain the conditions of his non-immigrant status. At the administrative hearing, he conceded his deportability but requested asylum.

An immigration judge denied his application for relief and ordered deportation. The Board of Immigration Appeals ("BIA") affirmed, dismissing William's direct appeal on September 24, 1997.

William filed a motion to reconsider on October 22, 1997, requesting withholding of deportation based on his change in marital status and his wife's eligibility for citizenship. The BIA construed his request as both a motion to reconsider its dismissal of his appeal and a motion to reopen to allow him to apply for adjustment of status based on the new fact of

his marriage to a lawful permanent resident.[1] The BIA denied the motion on April 30, 1998.

William filed a motion to reopen on July 28, 1998, attaching his marriage certificate and noting that his wife had completed the naturalization interview and tests and would be sworn in as a citizen in a few weeks. He requested permission to adjust his status once his wife was sworn in.

William submitted that his motion to reopen was timely because it was filed within ninety days of the denial of his motion to reconsider. The BIA disagreed, dismissing his motion to reopen as untimely and concluding that it should have been filed within ninety days of the dismissal of his direct appeal.

II.

INS regulations governing motions to reopen provide, in pertinent part, that "a party may file only one motion to reopen . . . and that motion must be filed no later than 90 days after the date on which the final

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[1] This ruling motivated the INS's argument that because the current motion was William's second motion to reopen, he was foreclosed from making that motion under 8 C.F.R. § 3.2(c)(2)'s requirement that he could file only one motion to reopen. But because the BIA did not address this argument in its decision, and because the INS does not reassert that argument on appeal, we do not consider it.

administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. § 3.2(c)(2). William's petition for review presents an issue of first impression: whether the decision in William's original appeal to the BIA, as distinguished from the subsequent denial of his motion to reconsider, was "the final administrative decision . . . in the proceeding to be reopened." If the dismissal of his original appeal qualifies, then his motion to reopen was untimely. But if the denial of his motion to reconsider is the final decision under § 3.2(c)(2), the motion to reopen was timely.

William argues that under *Stone v. INS*, 514 U.S. 386, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995), the denial of a motion to reconsider is a final order of deportation and that the denial of a motion to reconsider is a final administrative decision from which the ninety-day clock should start running. Thus, he concludes that the BIA's construction of the regulation is inconsistent with its plain meaning and therefore is not entitled to deference.

The INS responds by also citing *Stone*, in which the Court decided whether the filing of a motion to reconsider or reopen tolls the time during which judicial review of the underlying deportation order may be sought. The Court held that an order of deportation is final, that a denial of a motion to reconsider is a second

final order, and the time limits for seeking judicial review of a final order apply separately to each final order. *See id.* at 395, 115 S.Ct. 1537.

Thus, the INS argues that under *Stone*, both the denial of the motion to reconsider and the dismissal of the appeal of the deportation order should be considered "final administrative decisions" for purposes of § 3.2(c)(2). The INS reasons further that because William's motion to reopen should relate to "the proceeding to be reopened," it is the underlying deportation decision, and not the denial of the motion to reconsider, that is being challenged. This is so because William seeks to introduce new evidence that he contends will affect his deportation — i.e., that his wife is going to become a citizen.

This evidence could not be introduced in a proceeding for a motion to reconsider, the INS notes, because that type of motion challenges only the legal analysis employed by the immigration judge. The deportation proceeding is the proper forum for this new evidence, because there the immigration judge can take into account any additional factors supporting discretionary relief from deportation. That is to say, because an alien who seeks to introduce new evidence can reopen only a proceeding that once was open for the receipt of evidence, the motion to reopen must look back to an evidentiary proceeding rather than to the

denial of reconsideration.

William tries to refute this construction by arguing that he seeks to reopen all deportation "proceedings" related to his case, which therefore would include both the original deportation decision and the denial of his motion to reconsider. Although this is not an implausible reading of the statute, the better interpretation is that the language of § 3.2(c)(2) is not so broad and, instead, refers only to a single "proceeding" that a party may seek to reopen, and, again, the government reasonably argues that the denial of a motion to reconsider cannot be "reopened" where it was never open to the type of new evidence William seeks to introduce.

Thus, while the regulation's use of "final administrative decision" is facially unambiguous, it invites, in the context of the next phrase, "rendered in the proceeding sought to be reopened," at least two reasonable interpretations. Therefore, the provision is, at most, ambiguous as to the question presented in this appeal, so we defer to the INS's reasonable interpretation of its own regulation. *See Ghassan v. INS*, 972 F.2d 631, 637 (5th Cir.1992).

William avers that we should not defer, because the INS's interpretation is plainly unreasonable. This is so, he asserts, because "final" can only mean the "last"

administrative decision in his case.

Although William's construction is not unreasonable, neither is the INS's, because "final administrative decision" refers to "the proceeding sought to be reopened." It is possible that, as William suggests, this phrase refers to the broader deportation process, but we cannot say that the INS's determination that the phrase refers to the particular stage of the process sought to be reopened is "plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994).

Accordingly, the petition for review is DENIED, and the order of the BIA is AFFIRMED.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A73 122 128 - Houston Date: May 21, 1999
In re: HANY E. WILLIAM
IN DEPORTATION PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT:
Hanna Z. Hanna, Esquire

ON BEHALF OF SERVICE: Donald W. Cassidy
Deputy District
Counsel

ORDER:

PER CURIAM. The motion to reopen has been filed out of time and will be denied. Our prior order in these proceedings was entered on September 24, 1997. Pursuant to 8 C.F.R. § 3.2(c)(2) with certain exceptions not pertinent here, a motion to reopen in any case previously the subject of a final decision by the Board must be filed not later than 90 days after the date of that decision, or on or before September 30, 1996, whichever is later. *See* 61 Fed. Reg. 18,900 (1996). In the instant case, a motion to reopen would have been due on or before December 23, 1997. The

record reflects, however, that the Board did not receive the motion until July 28, 1998. The motion to reopen was therefore filed out of time. Accordingly, the motion to reopen is denied.

Lauren R. Mathon
FOR THE BOARD

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A73 122 128 - Houston Date: April 30, 1998

In re: HANY E. WILLIAM
IN DEPORTATION PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT:
Hanna Z. Hanna, Esquire
401 Broadway, Suite 804
New York, New York 10013

ON BEHALF OF SERVICE:
Benjamin D. Somera
Assistant District Counsel

CHARGE:
Order: Sec. 241(a)(1)(C)(i), I&N Act [8 U.S.C. § 1251(a)(1)(C)(i)] - Nonimmigrant - failed to comply with conditions of status

APPLICATION: Reconsideration: reopening

ORDER:

PER CURIAM. The motion to reconsider is

denied. The motion to reopen is also denied.

On September 24, 1997, this Board dismissed the respondent's appeal from the Immigration Judge's July 27, 1995, decision denying his application for asylum and withholding of deportation under sections 208 and 242(h) of the Immigration and Naturalization Act, 8 U.S.C. §§ 1158, 1253(h), and ordering him deported from the United States to Egypt. By motion filed October 22, 1997, the respondent has asked the Board to reconsider its decision in the matter in light of an unpublished decision finding a well-founded fear of persecution in the case of a Coptic Christian from Egypt. In support of his motion, the respondent has proffered new evidence to bolster his argument that, as a Coptic Christian, he too has a well-founded fear of persecution. The Immigration and Naturalization Service opposes the motion.

As the Service points out in its statement of opposition, an unpublished decision is without precedential value. *Matter of Arthur*, 20 I&N Dec. 475, 479 (BIA 1992); *Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Moreover, we note that in the unpublished decision relied upon by the respondent, the alien was not found eligible for asylum because of a "pattern or practice of persecution" of Coptic Christians in Egypt. 8 C.F.R. § 208. 13(b)(2)(i) (1997). Rather, the alien established that he was particularly at

risk of persecution because of his involvement with religious and church activities. *See, e.g., Kotasz v. INS*, 31 F.3d 847, 853 (9th Cir. 1994) (holding that in non-pattern or practice cases, the risk faced by an individual because of membership in a disfavored group can rise to the level required for establishing a well-founded fear of persecution as a result of the individual's activities in support of the group). Thus, the case finding asylum eligibility is distinguishable from that of the respondent before us, who has presented no specific evidence of a "particularized threat of persecution" on account of his Coptic Christian religion or any of the other grounds protected under the Act. *Id.* We therefore decline to reconsider our dismissal of the respondent's appeal in this case. *See Matter of Cema*, 20 I&N Dec. 399 (BIA 1991), *aff'd, Cema v. INS*, 979 F.2d 212 (11th Cir. 1992); 8 C.F.R. § 3.2(b)(1) (1997).

The respondent alternatively seeks to reopen proceedings to allow him an opportunity to apply for adjustment of status based on his marriage to a lawful permanent resident.[1] Contrary to his assertions, though, the respondent has failed to establish prima

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1 The respondent appears to characterize such an opportunity as "withholding of deportation." However, to qualify for withholding of deportation under section 243(h) of the Act, he must establish a clear probability of persecution on account of a protected ground, which he has failed to do.

facie eligibility for adjustment of status. For instance, although he indicates that his wife has filed for naturalization, he has failed to show that an immigrant visa is "immediately available" to him. Section 245(a) of the Act, 8 U.S.C. § 1255(a). In any event, despite the Service's opposition to his motion, the respondent has failed to submit an adjustment application (Form 1-485). *See Matter of Yewondwosen*, Interim Decision 3327 (BIA 1997); 8 C.F.R. § 3.2(c)(1) (1997). Accordingly, we also deny the respondent's request for reopening.

Fred W. Vacca
FOR THE BOARD

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A73 122 128 - Houston

Date: SEP 24, 1997

In re: HANY E. WILLIAM
IN DEPORTATION PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Janet B. Beck, Esquire
Judith G. Cooper, P.C.
3040 Post Oak Boulevard, Suite 1450
Houston, Texas 77056-6511

ON BEHALF OF SERVICE:
Benjamin D. Somera
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(C)(i), I&N Act [8 U.S.C. § 1251(a)(1)(C)(i)] -Nonimmigrant - failed to comply with conditions of status

APPLICATION: Asylum; withholding of deportation; voluntary departure; remand

In a decision dated July 27, 1995, the Immigration Judge found the respondent deportable as charged, denied his application for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1253(h), and ordered him deported from the United States to Egypt. The respondent has appealed. The appeal will be dismissed. The request for oral argument is denied. *See* 8 C.F.R. § 3.1(e).

The respondent is a 24-year-old Coptic Christian from Egypt who claims that the Egyptian government suspects him of being an Israeli spy. On appeal, he argues through counsel that he was deprived of a fair hearing before the Immigration Judge. More specifically, he maintains that the Immigration Judge refused to allow him to present evidence on his own behalf, denied him his right to counsel, and erroneously admitted into evidence the Immigration and Naturalization Service's notice of intent to deny his prior asylum application. He also contends that the Service trial attorney was inappropriately permitted to advise and question him regarding the relief of voluntary departure. With his appeal, he has proffered new evidence.

Having reviewed the record, we find no merit to the appeal. The respondent's fair hearing claim essentially turns on the issue of whether he was truly

denied his right to counsel. The record reflects that the manner in which the hearing was held was largely related to the fact that the respondent was unrepresented. As the respondent was unrepresented, he had no advocate to present evidence on his behalf or to conduct his direct examination once the issue of his deportability was settled.[1] We note in this regard that notwithstanding counsel's arguments on appeal, the record includes no evidence whatsoever that the respondent himself ever proffered any evidence, including witnesses, at the hearing.

However, the record further reflects that on April 26, 1995, the respondent was advised of his right to counsel at his own expense and provided with a list of

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[1] The respondent does not appear to contest his deportability as a nonimmigrant who failed to maintain or comply with the conditions of his nonimmigrant status. Rather, his arguments focus on his applications for relief from deportation, for which he alone bears the burden of proof. *E.g. Matter of S-M-J-*, Interim Decision 3303 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); *Matter of Seda*, 17 I&N Dec. 550, 554 (BIA 1980); 8 C.F.R. §§ 208.13(a). 208.16(b); 242.17(e). 244.1. While both the Immigration Judge and the Service have a role to place in producing an adequate record for the adjudication of an asylum claim, their obligations in this respect do not shift the burden of proof. *See Matter of S-M-J-, supra* at 11 n.3.

available free legal services programs in his area in accordance with the regulations at 8 C.F.R. § 242.16(a) (Tr. at 2-3). *See* sections 242(b)(2) and 292 of the Act, 8 U.S.C. §§ 1252(b)(2), 1362. This is not even disputed on appeal. Nevertheless, the respondent argues that the Immigration Judge failed to adequately inquire whether he wished to retain counsel or to determine whether his waiver of this right was effective. We consider this argument specious. The respondent was offered a continuance to obtain counsel, but indicated that he wished to proceed on his own and represent himself (Tr. at 3). Moreover, at the reconvened hearing on the merits of the respondent's applications for relief from deportation, the respondent again appeared without counsel despite having been advised by the Immigration Judge at the conclusion of his prior hearing that he could still obtain counsel if he so desired. As the reconvened hearing was held on July 27, 1995, it is apparent the respondent had ample opportunity to secure counsel and, for whatever reason, simply failed to do so. Therefore, we are fully satisfied that the respondent's waiver of his right to counsel was knowingly, intelligently, and competently made, and thus, the Immigration Judge was under no obligation to make a further inquiry in this regard. *See Cobourne v. INS*, 779 F.2d 1564 (11th Cir. 1986); *Matter of Gutierrez*, 16 I&N Dec. 226 (BIA 1977).

In the absence of counsel for the respondent,

his examination was left primarily to the Service trial attorney. Unlike the respondent, the Service trial attorney also introduced documentation into evidence, including an affidavit by the respondent which counsel relies upon in restating the facts of the respondent's asylum claim on appeal even though it is inconsistent with his testimony. Indeed, the documentation apparently was introduced for the sole purpose of impeaching the respondent's testimony. This case is therefore distinguishable from *Olabanji v. INS*, 973 F.2d 1232 (5th Cir. 1992), where the Service sought to rely on hearsay evidence from an alien's spouse and a forensic document analyst to prove the alien's deportability for marriage fraud. As such, we find no basis for concluding that the notice of intent to deny at issue on appeal was inadmissible. *See Calderon-Ontiveros* v. INS, 809 F.2d 1050 (5th Cir. 1986); *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); 8 C.F.R. § 242.15(c). We point out, however, that there is no indication that the Immigration Judge relied on the notice in denying the respondent's claim. We also find no evidence that the Service trial attorney misadvised the respondent as to voluntary departure, particularly as it was explained to him on the record that a grant of that form of relief would not necessarily mean that he would return to Egypt (Tr. at 48).

In any event, we note that in deportation

proceedings, "an alien has not been given a fair hearing only if he has been prejudiced by some deficiency so as to deprive him of due process." *Matter of D-*, 20 I&N Dec. 827, 831 (BIA 1994); *see, e.g., Prichard-Ciriza v. INS*, 978 F.2d 219 (5th Cir. 1992); *Calderon-Ontiveros v. INS, supra; Matter of Santos*, 19 I&N Dec. 105 (BIA 1984). In this case, counsel for the respondent argues at length that the proceedings were defective, but she fails to demonstrate how the respondent's case would have been affected had the hearing been conducted differently. We emphasize in this regard that while evidence has been proffered on appeal, there has been no showing that such evidence could not have been presented before the Immigration Judge. We therefore find no basis for a remand of the record. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992); *see also Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984) ("The Board is an appellate body whose function is to review, not to create, a record.").

As for the merits of the respondent's asylum claim, we note that "[p]ersecution is an extreme concept, which ordinarily does not include '[d]iscrimination on the basis of race or religion, as morally reprehensible as it may be." *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (quoting *Ghalv v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995); *see also Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]he concept of persecution does not encompass all treatment that our

society regards as unfair, unjust, or even unlawful or unconstitutional."); *Balazoski v. INS*, 932 F.2d 638 (7th Cir. 1991) (finding that "persecution" means more than harassment); *Matter of Pierre*, 15 I&N Dec. 461, 463 (BIA 1975) ("Not every unlawful act of individual harassment will amount to persecution" within the meaning of the Act.). The respondent before us admitted that he has never been arrested, detained, or physically abused by the Egyptian authorities (Tr. at 31). He vaguely indicated that he has been mistreated or fears mistreatment by Islamists, but the background evidence of record indicates that "[s]ecurity forces arrest terrorists who perpetrate violence against Copts," though as in this country, the government does not always prevent terroristic attacks (Exh. 8).

Thus, we are not persuaded that the government condones religiously-motivated violence or that it is unable or unwilling to protect its Coptic Christian minority. *See Ghalv v. INS*, 58 F.3d 1424, 1431 (9th Cir. 1995); *Yacoub v. INS*, 999 F.2d 1296, 1297 (8th Cir. 1993); *Elnager v. INS*, 930 F.2d 784, 789 (9th Cir. 1991); *cf. Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996) (finding an Indo-Fijian eligible for asylum where he faced persistent death threats and assaults despite having reported each and every threat and assault to the police and identifying his assailants by name); *Abdel-Masieh v. INS*, 73 F.3d 579 (5th Cir. 1996) (holding that the Board erred in denying asylum

to a Christian Sudanese who brought forward evidence that the current military government had consistently promoted an agenda for imposing Islamic laws on all Sudanese citizens and that those efforts by the government had markedly increased religious intolerance and discrimination throughout the country). Moreover, while he claims that he has been investigated for espionage, his own testimony indicates that this is because of his frequent trips to Israel to visit his father, who works for Egyptian Airlines, rather than his actual or imputed political opinion.[2] In short, we find insufficient evidence to support the contention that the respondent has been persecuted or has a well-founded fear of persecution on account of one of the grounds protected under the Act. *See INS v. Elias-Zacarias*, 502 U.S. 478 (BIA 1992); *INS v. Cardoza-Fonseca*, 480

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[2] For instance, in contrast to his affidavit, the respondent testified that he was interrogated when he would "come back to Egypt" (Tr. at 22), indicating that he was only subject to routine questioning at the border upon his returns from Israel. Indeed, while the Egyptian government certainly has a right to investigate its citizens for espionage, *see Matter of R-O-*. 20 I&N Dec. 455 (BIA 1992), we doubt that the respondent was ever even seriously suspected of being a spy, because his passport apparently was never revoked (Tr. at 32). *See Urokov v. INS*, 55 F.3d 222 (7th Cir. 1995); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988).

U.S. 421 (1987); *Matter of S-P-*, Interim Decision 3287 (BIA 1996); *Matter of R-O-*, 20 I&N Dec. 455 (BIA 1992). It follows that he has not satisfied the clear probability standard of eligibility required for withholding of deportation. *See INS v. Cardoza-Fonseca, supra; INS v. Stevic*, 467 U.S. 407 (1984); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

The respondent failed to qualify himself for voluntary departure. The regulations at 8 C.F.R. § 244.1 require that an alien establish that he "is willing and has the immediate means with which to depart promptly from the United States." The respondent, however, testified that he is unwilling to depart and that he does not have "the funds" (Tr. at 49).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Mary Maguire Dunne
FOR THE BOARD

Supreme Court, U.S.
FILED

FEB 12 2001

OFFICE OF THE CLERK

(2)

No. 00-584

In the Supreme Court of the United States

HANY E. WILLIAM, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

A regulation promulgated by the Attorney General directs that a motion to reopen a deportation or exclusion proceeding "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. 3.2(c)(2). The question presented is:

Whether a motion to reopen is timely if it is filed more than 90 days after the final administrative decision, but within 90 days of the Board of Immigration Appeals' denial of a motion to reconsider that decision.

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In the Supreme Court of the United States

No. 00-584

HANY E. WILLIAM, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-7) is reported at 217 F.3d 340. The decisions of the Board of Immigration Appeals (Pet. App. 8-9, 10-13, 14-22) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 17, 2000. The petition for a writ of certiorari was filed on October 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. By regulation, an alien who has received an administrative adjudication of his claims for relief from deportation or exclusion may file a motion to reopen the

administrative proceeding based on material evidence that "was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 3.2(c)(1). An alien, however, "may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge)," and that motion "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later." 8 C.F.R. 3.2(c)(2).[1]

2. Petitioner, a citizen of Egypt, entered the United States in 1992 on a student visa. In 1994, the Immigration and Naturalization Service (INS) initiated deportation proceedings against petitioner for failing to comply with the conditions of his non-immigrant status. Pet. App. 2. Petitioner conceded that he was deportable, but requested asylum. The immigration judge denied relief and ordered deportation. *Ibid.* The Board of Immigration Appeals (Board) affirmed the order of deportation on September 24, 1997. *Id.* at 14-22.

Petitioner filed a timely motion to reconsider with the Board, in which he proffered new evidence to support his claim of a well-founded fear of persecution as a Coptic Christian. Pet. App. 11. In that same motion, petitioner also sought to reopen the proceedings to apply for adjustment of status based on his marriage and the possible naturalization of his wife. *Id.* at 12.

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[1] The time limit does not apply to claims for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or the country to which deportation is ordered, if the evidence of changed conditions is material and was unavailable at the time of the original hearing. 8 C.F.R. 3.2(c)(3)(ii).

The Board denied the motion to reconsider on the ground that petitioner had failed to identify evidence of a particularized threat based on religion. *Id.* at 11-12. The Board then denied the motion to reopen on the ground that petitioner had failed to establish prima facie eligibility for adjustment of status and failed to comply with the rules for presentation of such a claim. *Id.* at 12-13.

On July 28, 1998, petitioner filed a second motion to reopen, again seeking relief based on his anticipated eligibility for adjustment of status once his wife was naturalized. Pet. App. 3. Petitioner asserted that his motion was timely because it was filed within 90 days of the Board's denial of his earlier motions to reconsider and reopen. *Ibid.* Because the Board understood petitioner's motion as a request to reopen the Board's decision on his underlying eligibility for deportation—a matter adjudicated in the Board's September 1997 ruling—the Board dismissed the motion as untimely. *Id.* at 8-9.

3. The court of appeals affirmed. Pet. App. 1-7. The court held that the Board reasonably determined that the "final administrative decision" triggering the 90-day time limit in 8 C.F.R. 3.2(c)(2) was the Board's issuance of a final decision dismissing petitioner's appeal from the immigration judge's order of deportation. The court stressed that a motion to reopen seeks to introduce new evidence and thus must be directed to proceedings that were once open for the consideration of evidence. Pet. App. 5. Only the process that led up to the entry of the final order of deportation involved the consideration of evidence, the court explained. *Id.* at 5-6. By contrast, the court concluded, the Board's denial of the motion to reconsider represented only the Board's refusal to disturb the finality of the admini-

strative process and thus did not toll the running of the 90-day limitations period. The court emphasized that the phrase "final administrative decision" in the regulation refers to "the proceeding sought to be reopened," and concluded that the Board's determination that "the proceeding sought to be reopened" refers to the particular stage of the administrative process that the alien seeks to alter, rather than to the entire deportation process as a whole, is not "plainly erroneous or inconsistent with the regulation." *Id.* at 7.

ARGUMENT

Petitioner seeks this Court's review of the court of appeals' decision upholding the Board of Immigration Appeals' interpretation of the regulation governing the filing of motions to reopen deportation proceedings. That issue does not merit further review.

1. Petitioner identifies no conflict in the circuits on that question. Nor are we aware of any. To the contrary, as petitioner concedes (Pet. 18-19), the court of appeals' decision appears to be the first appellate ruling on the question.

2. Petitioner likewise fails to establish a conflict with any decision of this Court. To the contrary, the Board's construction of the phrase "final administrative decision" in the regulation accords with this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995). In *Stone*, the Court recognized that a deportation order becomes "final" upon the Board's dismissal of an appeal or the alien's waiver of the right to appeal, *id.* at 390, and held that the filing of a motion to reconsider does not "dislodge[] the earlier proceeding reviewing the underlying order" or otherwise disturb its finality, *id.* at 394. See also 8 U.S.C. 1101(a)(47)(B)(i) (Supp. V 1999) (pro-

viding that an order of deportation becomes final upon the Board's affirmance of the order).

Petitioner places great weight (Pet. 17, 20-21) on the Court's holding in *Stone* that a denial of a motion to reconsider is a separate and distinct final order subject to judicial review. See 514 U.S. at 394-398. But that argument is of no help to petitioner. The INS regulation makes clear that the "final administrative decision" that triggers the 90-day filing period is the final administrative decision "in the proceeding sought to be reopened." 8 C.F.R. 3.2(c)(2). Petitioner's motion did not seek to reopen the Board's consideration of the legal merits of his motion for reconsideration. Rather, the "proceeding sought to be reopened" by petitioner's motion was the underlying proceeding that culminated in the order of deportation, because that is the only proceeding in which his proffered evidence concerning his marital status can be considered and might have relevance. That final administrative decision, however, was issued more than ten months before petitioner filed his motion to reopen, rendering his motion untimely.[2]

3. The court of appeals' decision is correct. The Board's interpretation of the regulation is consistent with its text and purpose. A motion to reopen seeks to

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[2] Furthermore, the court of appeals' deference to the Board's consistent interpretation of the governing regulation is consistent with this Court's decisions. See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); see also 8 C.F.R. 241.31 (providing that an order of deportation becomes final upon the Board's dismissal of an appeal); *In re L-V-K*, Interim Dec. 3409, 1999 WL 607159 (BIA Aug. 10, 1999) (en banc) (holding that the time limit in 8 C.F.R. 3.2(c)(2) on filing motions to reopen begins to run when an order of deportation matures into a final order, regardless of the disposition of subsequent motions), vacated on other grounds, No. 99-71060 (9th Cir. Apr. 3, 2000).

reconvene "deportation or exclusion proceedings," 8 C.F.R. 3.2(c)(2), for the presentation of "new facts that will be proven at a hearing to be held if the motion is granted." 8 C.F.R. 3.2(c)(1). The regulation further directs that the motion cannot be granted "unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 3.2(c)(1).

Because a motion to reopen, by regulatory definition, seeks to inject new evidence into the deportation analysis, the motion necessarily must seek to open a proceeding that is capable of receiving and considering that new evidence. The Board's denial of a motion to reconsider is not fitted for such a task, because it addresses questions of error or oversight in the Board's legal analysis, not consideration of previously unavailable factual evidence that could impact that analysis. Cf. *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 278-279 (1987). In other words, the Board's denial of a motion to reconsider is nothing more than a decision not to disturb the finality of the underlying deportation proceedings.

The Board's and court of appeals' interpretation of the regulation, moreover, comports with the presumption of administrative finality by requiring that reopening be requested shortly after an order of deportation matures into a final order. See, *e.g.*, *INS* v. *Doherty*, 502 U.S. 314, 323 (1992) ("Motions for reopening of immigration proceedings are disfavored * * *. This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."); see also *Stone*, 514 U.S. at 399 (noting Congress's "fundamental pur-

pose * * * to abbreviate the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts") (quoting *Foti* v. *INS*, 375 U.S. 217, 224 (1963)).[3]

4. Further review is unwarranted in any event, because the judgment below is correct on an independent ground. At the time petitioner filed his motion to reopen, the Board had already considered and denied one motion to reopen by petitioner. See Pet. App. 12-13. Thus, regardless of its untimeliness, petitioner's second motion to reopen is independently barred by the regulatory prohibition on the filing of successive motions to reopen. See 8 C.F.R. 3.2(c)(2) ("[A] party

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[3] Petitioner's reliance (Pet. 17-18) on the current version of 8 U.S.C. 1229a(c)(6) (Supp. V 1999), which, in addressing motions to reopen, omits the regulatory phrase "in the proceedings sought to be reopened," is misplaced in two respects. First, because petitioner challenges a Board decision issued on or after October 31, 1996, in a deportation case initiated prior to April 1, 1997, the transition rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, govern his case, which makes the current Section 1229a(c)(6) inapplicable, as petitioner himself concedes (Pet. 17). Second, even if it did apply, the amendment offers petitioner no aid because it continues to require the filing of a motion to reopen within ninety days of the final administrative order of removal. 8 U.S.C. 1229a(c)(6)(C)(i) (Supp. V 1999). Nothing in the statute undercuts the established meaning of "final order" as the point in time when an order of deportation becomes administratively final because of the alien's waiver of appeal, the lapse of the time allowed for appeal, or the Board's dismissal of the appeal. See 8 U.S.C. 1101(a)(47)(B) (Supp. V 1999); 8 C.F.R. 3.39, 241.31. In addition, to the extent Congress left the term "final administrative order of removal" undefined, the Board has broad authority to interpret that term. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 423-425 (1999); see also *Lopez* v. *Davis*, 121 S. Ct. 714, 722 (2001).

may file only one motion to reopen deportation or exclusion proceedings."). Petitioner has never contested the applicability of that prohibition or argued that he falls within a recognized exception (see 8 C.F.R. 3.2(c)(3)) to the prohibition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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